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In the Supreme Court of the United States

OCTOBER TERM, 1943

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Treaties and statute involved	2
Statement	2
Argument	2
Conclusion	11
Appendix	18

CITATIONS

Cases:

Assiniboine Indians v. *United States*, 77 C. Cls. 437, appeal dismissed and certiorari denied, 292 U. S. 606 16

Blackfeet, et al. Nations v. *United States*, 81 C. Cls. 101 14

Coos Bay Indian Tribe, et al. v. *United States*, 87 C. Cls. 143 12

Crow Nation v. *United States*, 81 C. Cls. 238 16

Duwamish, et al. Indians v. *United States*, 79 C. Cls. 530 12

Fort Berthold Indians v. *United States*, 71 C. Cls. 308 16

Hayt v. *United States, et al.*, 38 C. Cls. 455 12

Jones v. *Meehan*, 175 U. S. 1 ..... 11, 17

United States v. *Choctaw &c. Nations*, 179 U. S. 494 13

United States v. *Mille Lac Chippewas*, 229 U. S. 498 14

United States v. *Northern Pacific Ry. Co.*, 311 U. S. 317 16

United States v. *Santa Fe Pacific R. Co.*, 314 U. S. 339 ..... 11, 15, 17

The Wichita Indians, et al. v. *United States*, 89 C. Cls. 378 .....

Statutes and Treaties:

Act of July 5, 1862, 12 Stat. 512, 529 4

Act of February 23, 1865, 13 Stat. 432 ..... 8, 13

Act of February 28, 1929, 45 Stat. 1407 ..... 2, 12, 19

Eastern Shoshone Treaty of July 2, 1863 ..... 2, 6, 12

Eastern Shoshone Treaty of July 3, 1868 9

Fort Laramie Treaty of September 17, 1851 16

Mixed Bands Treaty of October 14, 1863 2

Northwestern Shoshone Treaty of July 30, 1863 ..... 2, 6, 12, 14, 16, 17

Shoshonee-Goship Treaty of October 12, 1863 2

Western Shoshone Treaty of October 1, 1863 2

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OPINION BELOW

The first opinion (R. 63–76) of the Court of Claims is reported in 95 C. Cls. 642. The second opinion (R. 77) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered January 3, 1944 (R. 79). The petition for a writ of certiorari was filed April 21, 1944, an extension of time having been granted (R. 115). The jurisdiction of this Court is invoked

under section 3 of the Act of February 13, 1925, c. 229, 43 Stat. 938, 939, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752 (28 U. S. C. sec. 288).

QUESTION PRESENTED

Whether the treaty of July 30, 1863, acknowledged the Northwestern Shoshone Bands of Indians to have exclusive possessory right or title as against the United States to the lands involved.

TREATIES AND STATUTE INVOLVED

The Northwestern Shoshone Treaty of July 30, 1863, appears in the record at pages 43–44. The Eastern Shoshone Treaty of July 2, 1863, the Western Shoshone Treaty of October 1, 1863, the Shoshonee-Goship Treaty of October 12, 1863, and the Mixed Bands Treaty of October 14, 1863, appear in the record at pages 40–42, 44–47, 47–49, and 49–51, respectively. The Jurisdictional Act of February 28, 1929, c. 377, 45 Stat. 1407, is set forth in the Appendix, *infra*, pages 19–21.

STATEMENT

Under authority of the Act of February 28, 1929, c. 377, 45 Stat. 1407, the Northwestern Bands of Shoshone Indians filed their petition in the Court of Claims on March 28, 1931, seeking to recover damages for the taking by the United States of lands alleged to have been secured to them by the Northwestern Shoshone Treaty (R. 1–24).

The findings of the Court of Claims (R. 27–62) disclose the facts to be these. The Shoshone Nation of Indians was located in the territories of Washington and Utah. This nation or tribe of Indians, together with affiliated bands of Bannock Indians, roamed over, occupied, and used as their abode a vast area of approximately 80,285,000 acres of land. The Shoshone and Bannock Indians claimed this area as their home to the exclusion of other tribes of Indians, which recognized the right of the Shoshone and Bannock tribes to the possession, occupancy and use thereof. The home of the Shoshones and Bannocks became a part of the states of Wyoming, Colorado, Utah, Idaho, and Nevada. Petitioners were a part of of the several bands of the Shoshone Nation of Indians. The territory petitioners claim to have occupied as their home consisted of 15,643,000 acres of land of which 6,067,000 acres are located in the southeastern part of Idaho, 6,389,000 acres in the northwestern corner of Utah, including the Great Salt Lake, and 3,187,000 acres in the northeastern corner of Nevada. The population of the Shoshone and Bannock Indians in 1863 was about 9,700. Petitioners' population was between 1,500 and 1,800. (R. 27–28.)

In the 1850's and earlier the Government knew practically nothing about the Indians who inhabited the region which became southern Idaho, eastern Oregon, northern Nevada, and northern

Utah, their tribal distinctions, racial affiliations, or the specific areas occupied by particular tribes or bands of Indians. The Shoshone tribe always desired to be peaceful and friendly to the whites and to the Government. As a tribe they never engaged in war with the United States. Between 1849 and 1863, however, some of the Shoshones of the Northwestern Bands caused white emigrants and the Government considerable trouble by depredations and warlike acts because of the driving away of game and the destruction of food supply. The destruction of game and other sources of food reduced the Shoshones, particularly the Northwestern Bands, to a condition of practical starvation, making it necessary for them to "steal or starve." (R. 28–29.)

The Government supplied these Indians with little or nothing in the way of food and supplies, although the United States' agents and Indian superintendents urged this as an effective way of bringing about peace and friendship with the Indians (R. 32). These agents and superintendents also urged the making of a treaty with the Shoshone tribe, which desired to be friendly, in order to provide for the Indians and for the safety of emigrants and settlers. The Commissioner of Indian Affairs and the Secretary of the Interior made similar recommendations to Congress. However, Congress took no steps to this end until 1862 when by the Act of July 5, 1862,

12 Stat. 512, 529, $20,000 was appropriated to defray expenses of making a treaty with the Shoshones, the Secretary of the Interior having reported to Congress that while the lands of the Indians were unfit for cultivation and would probably not be required for settlement for many years, a treaty was desirable because of "the control which the Government would thereby be enabled to exercise over them, by which additional security would be given to the settlers in the Territory, and to the Overland Mail and Telegraph Lines." (R. 32–33.)

On July 22, 1862, the Commissioner of Indian Affairs instructed the commissioners who had been appointed to negotiate a treaty with the Shoshones that the Government knew little of the country inhabited and claimed by the Shoshones but understood that it was the country "through which lies the route of the overland mail, and the emigrant route * * * and it is mainly to secure the safety of the travel along these routes that a treaty is desirable"; and that while the treaty would not be negotiated "with a view to the extinguishment of the Indian title to the land," the United States' assurances of a desire for amicable relations and the payment of $20,000 in annuities should enable them to procure from the Indians agreement for the security of the overland-mail and emigrant routes and "also a definite acknowledgment as well of the bound-

aries of the entire country they claim, as of the limits within which they will confine themselves, which limits it is hardly necessary to state should be as remote from said routes as practicable" (R. 33–35). Because the Shoshones were scattered over a vast extent of country, the treaty commissioners had difficulty in establishing contact with them and it became necessary to meet with their various bands under their various chiefs or headmen at several points (R. 35–39).

In 1863 treaties were concluded with various branches of the Shoshone tribe. The Eastern Shoshone Treaty of July 2, 1863 (R. 40–42) stipulated for peace and friendship between the Indians and the United States, the protection of the emigrant routes, the establishment of military agricultural settlements and military posts along those routes, and the protection of the telegraph and overland stage routes. It provided for the payment by the United States of annuities in articles suitable for the wants and condition of the Indians as compensation to the Indians for "the driving away and destruction of game along the routes travelled by whites, and by the formation of agricultural and mining settlements." The treaty also set forth a description of "the Shoshonee country, as defined and described by said nation." The Northwestern Shoshone Treaty of

July 30, 1863 (R. 43–44) also stipulated for peace and friendship, incorporated all of the provisions of the Eastern Shoshone Treaty, and provided for the payment of annuities. Article IV thereof stated that "The country claimed by Pokatello, for himself and his people, is bounded on the west by Raft River and on the east by the Porteneuf Mountains." Similar treaties were made with the Western Shoshones, the Shoshonee-Goship Indians, and the Mixed Bands of Shoshone and Bannock Indians (R. 44–51). Treaty Commissioner James Duane Doty subsequently indicated the exterior boundaries of the country claimed by the Shoshones and the limits of the territory occupied by the various branches of the tribe on a map furnished by the General Land Office (R. 51, 55). Of the treaties Commissioner Doty wrote to the Commissioner of Indian Affairs, as follows (R. 54):

> The importance of these treaties to the government and to its citizens can only be appreciated by those who know the value of the continental telegraph and overland stage to the commercial and mercantile world, and the safety and security which peace alone can give to emigrant trains, and to the travel to the gold discoveries in the north, which exceed in richness—at least in the quality of the gold—any discoveries on this continent.

Each of the treaties, except the Western Shoshone Treaty, was ratified by the Senate with the following amendment (R. 57):

> Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof.

The various tribes or bands of Indians accepted their respective treaties as amended except the Mixed Bands of Shoshones and Bannocks which had become so scattered that they could not be assembled for the purpose of obtaining their formal consent to the amendment of their treaty. As to the Western Shoshone Treaty, the Senate first voted to ratify it with a similar amendment but subsequently voted to reconsider action on the treaty and finally ratified the treaty without amendment except as to the amount of annuities to be paid under the treaty (R. 57–58).

By Act of February 23, 1865, 13 Stat. 432, Congress authorized the President to make treaties with the various tribes of the Utah Territory for "the absolute surrender * * * of their possessory right to all agricultural and mineral lands in said territory except such agricultural lands as by said treaties may be set

apart for reservations for said Indians" (R. 58–59). However, no further treaties were made with these Indians except a treaty of July 3, 1868, with the Eastern Bands of the Shoshone Tribe by which those bands of Indians ceded all lands claimed by them except a reservation of 3,047,730 acres in the Wind River section of Wyoming which was set apart for their use and occupancy and for the use and occupancy of other Indians whom they might be willing to admit amongst them (R. 59). Following the treaty of July 30, 1863, the Northwestern Bands of Shoshone Indians became widely scattered over northern Utah and Nevada and southern Idaho. Diminished numbers of these Indians eventually found abode on various Indian reservations in Idaho, Wyoming and Nevada. (R. 60.)

In Finding 15 the Court of Claims specifically found (R. 55–56) that in negotiating the five treaties with the various groups of Shoshone and Bannock Indians, the treaty commissioners and the Indians did not negotiate for acknowledgement by the United States of any exclusive Indian title, nor for any relinquishment by the Indians of any territorial claims they might have; that it was not the purpose of the treaty commissioners to acknowledge any territorial claims on the part of the Indians, and the treaty commissioners made no attempt to ascertain accurately the territories which the Indians may

have actually occupied, possessed and used to the exclusion of other Indians; and that the purpose of the United States and the treaty commissioners was to bring about peace and friendship with the Indians by making provision for annuities in articles suitable to their wants and condition in order that the routes of travel by the whites through the country occupied by the Indians and the white settlements therein might be free from attacks and depredations by the Indians.

In Finding 21 the court below found (R. 58) that prior to and at the time of the Northwestern Shoshone Treaty of July 30, 1863, the United States had not recognized a right of exclusive use, occupancy, and possession in the Northwestern Bands as against the United States to any of the territory within the Mexican cession and included in the country described in the treaty; that the treaty of July 30, 1863, contained no express or implied stipulation by the United States as to any Indian right, title, or interest in any land, and the United States never intended by the treaty to make any such stipulation; and that, on the contrary, the United States "has ever exercised dominion and complete ownership" over the territory claimed by the Northwestern Bands of Shoshone Indians.

Upon these findings the Court of Claims concluded, as a matter of law, that petitioners were not entitled to recover under the treaty of July

30, 1863, as for a taking by the United States of any portion of the 15,643,000 acres of land for which they sought compensation (R. 62). Accordingly, judgment was entered dismissing the petition (R. 79).

ARGUMENT

1. Under the policy of the United States Indian possessory rights or "Indian titles" based on aboriginal occupancy were recognized within the Mexican cession as well as elsewhere. *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 345–346. Hence, the case is the same as to the lands within and without the Mexican cession. It may be assumed that petitioners had "Indian title" to the whole or a part of the lands involved, *i. e.*, that they actually and as of right possessed, occupied, and used those lands to the exclusion of other tribes of Indians. See *id.* at page 345.[1] That petitioners may have had such title would not in itself authorize a recovery herein, since the

[1] Indian titles based on aboriginal occupancy have always been subject to the sovereign title of the United States. *Jones* v. *Meehan*, 175 U. S. 1, 8. Under governmental policy such titles were protected and could be interfered with or determined only by the United States. "The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable issues * * * And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts." *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 347.

jurisdictional act of February 28, 1929, 45 Stat. 1407 (see Appendix, *infra*, pp. 19–21) does not extend to claims based on mere immemorial occupancy but only to those arising under or growing out of the treaties named. Cf. *Hayt* v. *United States, et al.*, 38 C. Cls. 455, 462; *Duwamish, et al. Indians* v. *United States*, 79 C. Cls. 530, 599, 600; *Coos Bay Indian Tribe, et al.* v. *United States*, 87 C. Cls. 143; *The Wichita Indians, et al.* v. *United States*, 89 C. Cls. 378, 420. Therefore, the question here is whether the petitioners acquired a right to those lands to the exclusion of the United States under the Northwestern Shoshone Treaty of July 30, 1863 (R. 43–44), and the Eastern Shoshone Treaty of July 2, 1863 (R. 40–42), which was incorporated therein.

The treaty of July 30, 1863 (R. 43–44) contained no acknowledgment in express terms that petitioners' Indian title was good as against the United States' title. Nor is such an acknowledgment implicit in the circumstances (R. 28–39) under which that treaty and the related Shoshone treaties were made. Those circumstances evidence that the sole purpose of the treaties was to establish peace and and friendship between the United States and the Indians; to furnish the United States knowledge of the boundaries of the country inhabited and claimed by the Indians; to free from Indian molestation and depredation the existing routes of travel and telegraph and overland

stage lines and the projected agricultural settlements and military posts and the railroad line in the Shoshone country; and to compensate the Indians for loss of game and other means of livelihood by payment of annuities in articles suitable for their wants and condition. See *supra,* pp. 6–10.

Although the Act of February 23, 1865, 13 Stat. 432 (R. 58–59) authorized treaties with the Indians of Utah Territory for the cession of their lands, and although such a treaty was made with the eastern Shoshones (R. 59–60), no such treaty was ever made with petitioners. Following the treaty of July 30, 1863, the Northwestern Bands of Shoshone Indians became widely dispersed over northern Utah and Nevada and southern Idaho (R. 60). They subsequently settled in small groups upon various Indian reservations in Idaho, Wyoming, and Nevada (R. 60). And the United States always exercised complete dominion and ownership over the territory for which they seek compensation (R. 58).

While Indian treaties are to be construed generously in keeping with the honor of the United States and doubtful terms and provisions are to be resolved in accordance with the understanding of the Indians, they may not be interpreted to impose an obligation on the United States which is clearly negatived by attending facts and circumstances. *United States* v. *Choctaw &c. Na-*

tions, 179 U. S. 494, 531–534; *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 500; *Blackfeet et al. Nations* v. *United States*, 81 C. Cls. 101, 123. It follows that the treaty of July 30, 1863, was not intended to recognize a right in petitioners to the lands they claimed, good as against the United States.

2. Pervading petitioners' argument is the unjustified assumption that factual references to an aboriginal title are equivalent to recognition of a title valid as against the United States. Thus, they mention the description of the boundaries of the country claimed by petitioners in the treaty of July 30, 1863 (Pet. 12–13), the fact that Indian "claim" traditionally means Indian title (Pet. 13–14), the treaty commissioners' instructions not to negotiate the treaty with a view to extinguishment of petitioners' Indian title (R. 34, Pet. 14) and to obtain "a definite acknowledgment" of the territory petitioners claimed (R. 34, Pet. 14), and statements of administrative officials and legislation concerning petitioners' Indian title. They also refer to their own understanding that they had Indian title (Pet. 16). But that the Northwestern Bands of Shoshones may have had Indian title and the United States may have failed to extinguish it by treaty cannot, without more, be transformed into a title good as against the United States. Mention of the Indian boundaries in the treaty, particularly

in view of the Government's lack of and desire for knowledge of the Indians and the country they claimed (R. 28, 34), means no more than that by the treaty the Government sought and obtained information concerning the Indians and their habitats. While the Indians undoubtedly understood that their claim was of Indian title, the circumstances under which the treaty of July 30, 1863, was made (R. 29–39), as well as the subsequent conduct of the Indians (R. 60), refute the view that that treaty transmuted their aboriginal right into a right valid as against the United States.

The strongest argument in petitioners' favor is the provision of the treaty giving the United States the right to establish agricultural settlements and military posts in the Indians' territory and to construct the railroad line through it (R. 40–41, 43), but the contervailing evidence (R. 28–39) establishes that this provision was not so much one conferring rights in the Indians' country as one promising freedom from Indian molestation and depredation. The United States' later exercise of dominion and ownership over the territory petitioners claimed (R. 58) amounted to an extinguishment of petitioners' Indian title. Cf. *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 347. This together with the fact that the United States has never treated with petitioners for extinguishment of their title (R. 59),

indicates that the treaty of July 30, 1863, was not intended to acknowledge that petitioners' aboriginal title was valid as against the United States.

3. Contrary to petitioners' view (Pet. 17–20), the treaty of July 30, 1863, was not substantially the same as the Fort Laramie Treaty of September 17, 1851, involved in *Fort Berthold Indians* v. *United States,* 71 C. Cls. 308; *Assiniboine Indians* v. *United States,* 77 C. Cls. 347, appeal dismissed and certiorari denied, 292 U. S. 606; and *Crow Nation* v. *United States,* 81 C. Cls. 238. The object of the Fort Laramie Treaty was to put an end to internecine tribal warfare as well as to establish peace and amity between the tribes and the United States and to secure protection to white travellers. The boundaries of the "territories of" the several tribes were clearly described. "In what other way and for what other consideration could the commissioners have successfully accomplished their designed purpose than a governmental recognization of certain well-described lands as territory belonging to the Indians by right of occupancy?" *Fort Berthold Indians* v. *United States,* 71 C. Cls. 308, 315, 331.[2] The principal purpose of the

[2] But see *United States* v. *Northern Pacific Ry. Co.*, 311 U. S. 317, 347–349, where the court said the Fort Laramie treaty "did not alter the status" of the lands therein described or "create technical reservations as have many other treaties and acts of Congress."

Northwestern Shoshone Treaty, on the other hand, was to obtain freedom from Indian molestation and depredations against routes of travel; and payment of annuities was the chief means employed to accomplish that purpose. The boundaries of the "Shoshone Country" were not set out with precision, even in the Eastern Shoshone Treaty (R. 41).

Petitioners also err in believing that the decision below is in conflict with *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, with respect to lands within the Mexican Cession (Pet. 20–21). The *Santa Fe* case was not concerned with whether it was the United States' policy to recognize Indian possessory rights as against itself within the Mexican Cession. There this Court was dealing with a question of aboriginal title. Such a title may exist independently of "a treaty, statute, or other formal governmental action" (p. 347 of 314 U. S.), but that it exists does not mean that it is superior to the United States' title. See *Jones* v. *Meehan*, 175 U. S. 1, 8. In the grant involved in the *Santa Fe* case, the Government simply stipulated that the aboriginal title should prevail over the grantee's unless afterward extinguished by the United States. 314 U. S. at p. 344.

As petitioners state (Pet. 21–22), an Indian treaty, like an international treaty, may import recognition "of the territorial integrity of the

parties," but, since a mere Indian title is subordinate to the United States' title unless recognized as something more, an Indian treaty does not necessarily imply an acknowledgment that the Indian title is valid as against the United States. In alleging that the decision below seeks to "exalt the breach sued upon into proof that there was never any contract recognizing Indian ownership" by holding that petitioners' title was extinguished by the United States' subsequent exercise of complete dominion and ownership (Pet. 22–24), petitioners confuse aboriginal title with title valid as against the United States. The former was indeed extinguished; the question is whether the latter ever was created. The court below correctly held that it was not.

CONCLUSION

The decision below involves no conflict of decision or other question warranting certiorari, and is correct. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1944.

APPENDIX

The Act of February 28, 1929, 45 Stat. 1407, reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction be, and hereby is, conferred upon the Court of Claims, notwithstanding lapse of time or statutes of limitations, to hear, adjudicate, and render judgment in any and all claims which the northwestern bands of Shoshone Indians may have against the United States arising under or growing out of the treaty of July 2, 1863 (Eighteenth Statutes, page 685–2 Kappler, 848); treaty of July 30, 1863 (Thirteenth Statutes, page 863–2 Kappler, 850); Act of Congress approved December 15, 1874 (Eighteenth Statutes, page 291), and any subsequent treaty Act of Congress, or Executive order, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.
>
> SEC. 2. That any and all claims against the United States within the purview of this Act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within five years from the date of the approval of this Act; and such suit shall make the northwestern bands of Shoshone Indians party plaintiff and the United States party defendant. The petition shall be verified by

the attorney or attorneys employed to prosecute such claims under contract with the northwestern bands of Shoshone Indians, approved by the Commissioner of Indian Affairs and the Secretary of the Interior as provided by law. Official letters, papers, documents, and records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys for said Indians to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for said Indians.

SEC. 3. That in said suit the Court of Claims shall also hear, examine, consider, and adjudicate all claims which the United States may have against the said northwestern bands of Shoshone Indians. Any payment which may have been made by the United States, including gratuities for the benefit of any band or bands of said Indians or for their support and civilization, shall not operate as an estoppel, but may be pleaded as a set-off in said suit.

SEC. 4. That from the decision of the Court of Claims in any suit prosecuted under the authority of this Act an appeal may be taken by either party, as in other cases, to the Supreme Court of the United States.

SEC. 5. The Court of Claims shall have full authority by proper process and orders to bring in and make parties to such suit any and all persons deemed by it necessary or proper to the final determination of the matters in controversy.

SEC. 6. A copy of the petition shall, in such case, be served upon the Attorney General of the United States, and he or some attorney from the Department of Justice

to be designated by him is hereby directed to appear and defend the interests of the United States in such case.

SEC. 7. Upon final determination of such suit or suits the Court of Claims shall have jurisdiction to fix and determine a reasonable fee, not to exceed 10 per centum of the recovery, together with all necessary and proper expenses incurred in preparation and prosecution of the suit, to be paid to the attorney or attorneys employed by said northwestern bands of Shoshone Indians, or any of them, and the same shall be included in the decree and shall be paid out of any sum or sums found to be due said bands.

SEC. 8. The balance of the proceeds of all amounts, if any, recovered for said northwestern bands of Shoshone Indians shall be deposited in the Treasury of the United States to the credit of the Indians decreed by said court to be entitled thereto, and shall draw interest at the rate of 4 per centum per annum from the date of the judgment or decree and shall be subject to appropriation by Congress only for the health, education, and industrial advancement of said Indians.

Approved, February 28, 1929.

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